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IN THE

Supreme Court of the United States

October Term, 1956

No. 970

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC. and PATRICK HAMILTON,

Respondents.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Respondents.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Question Presented.

The District Court found that petitioners' commercial television play "Auto Light" was "copied in substantial part from the motion picture photoplay 'Gas Light' . . ." and that the "part so copied was and is a substantial part of said play and of the copyrightable and copyrighted material in said motion picture photoplay." [R. 84 (Find. XII).] The Court of Appeals concurred in those findings. [R. 283. Pet., Appendix B, 20.] They are not challenged here. The question, then, is whether copying or taking of substantial material—which, had it been taken and used in any other medium of expression, would clearly have been an infringement of the rights secured by re-

spondents' copyright—is privileged merely because the taking was for the purpose of parodying the copyrighted work. Both the District Court [R. 85 (Find. XV)] and the Court of Appeals [R. 283-285. Pet., Appendix B, 21-22] answered that it was not; and that the parodist was liable for his unauthorized appropriation to the same extent and for the same reasons as any other appropriator would have been.

Statement.

Since the findings of substantial copying are not challenged, no useful purpose would be served by reciting in detail the evidence upon which those findings are based. We, therefore, leave petitioners' statement [Pet. 3-6] with the few following additions.

Synopses of the infringed and infringing work, more accurate than those supplied by petitioners [Pet., Appendix A], will be found in the opinion of the Court of Appeals. [R. 280-282.] From these it will be seen that there was much more done by petitioners than merely "to poke fun" at the photoplay. Rather, there was baldly taken from it the locale, the main setting, the principal characters, the story points, the development, treatment, incidents and sequence of events of the story, and much of the dialogue. [R. 282. Pet., Appendix B, 19-20.]

In addition to the sum of $150,000 which respondent Loew's paid to acquire the motion picture rights to the drama on which its photoplay was based [R. 53], the sum of $126,691.98 was expended for screenwriters to adapt that drama to the screen. [R. 53.] On the other hand, the total writing cost of petitioners' play was only $5,716.66—obviously much less than the cost would have been if petitioners had been compelled to acquire the rights

to the material which they lifted from the photoplay or to create their own material. [R. 70.]

To petitioners' quotation from section 1 of the Copyright Act [61 Stat. 652, 17 U. S. Code, sec. 1] there should be added the provisions of subdivision (c) of section 1, which secure the copright proprietor in the right "to play or perform [the work] in public for profit, and to exhibit, represent, produce or reproduce it in any manner or by any method whatsoever. . . ." Petitioners' play was intended to be played or performed in public for profit; and it would have been so represented and performed but for the preliminary injunction below. [R. 69 (par. 26); 83-84 (Find. XI).] It was designed for use as an integral part of a television program advertising Lucky Strike cigarettes manufactured by petitioner American Tobacco Co. The air time for that advertising program was sold by petitioner Columbia Broadcasting System. Petitioner Jack Benny—whose part in the program was, of course, to attract the audience to be subjected to the advertising message—was compensated for those services. [R. 64 (par. 18); 67-68 (par. 22); 69 (par. 26).]

With respect to Benny's custom "to present short burlesques or parodies which poke fun at specific motion pictures . . ." [Pet. 4], the fact is that respondent Loew's was not a willing participant in his use of its copyrighted material without its consent. In a good many instances its permission to make such a use of its material was requested by Benny; and permission was granted on condition that Loew's have the right to approve his script. [R. 57-59.] In other instances, Benny's parodies were of motion pictures the basic literary material of which was in the public domain. [R. 59.] Benny, of course, was free, as was everyone else, to use this material. Use of the

copyrighted material from the photoplay "Gas Light", for Benny's parody was the subject of prompt objection by Loew's as soon as petitioners' activities in that regard were brought to Loew's attention. [R. 65-68; 84-85 (Find. XIV).]

It is customary and usual practice in the motion picture industry, to reissue photoplays five years or more after their initial release. "Gas Light" has not yet been reissued. [R. 56.] The copyright of that photoplay was secured in 1944 by publication with notice affixed; so, even without renewal, it will not expire before 1970. [R. 53-54 (par. 7).] It is, of course, common knowledge that motion pictures are frequently licensed by their owners for exhibition on television, in competition with "live" shows and with motion pictures being exhibited in theatres [see, *e.g., Republic Pictures Corp. v. Rogers*, 9 Cir., 213 F. 2d 662, *cert. den.*, 348 U. S. 858; *Autry v. Republic Productions*, 9 Cir., 213 F. 2d 667, *cert. den.*, 348 U. S. 858]; that television exhibition of motion pictures usually takes place many years after they were produced; and that the free entertainment supplied viewers of television has had a serious impact on motion picture theatre attendance.[1]

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[1]This latter fact discloses the economic basis for this litigation. Loew's is a large producer of motion pictures for which the theatre is the primary outlet. Television, too, is a source of revenue in that regard. Loew's, perforce, recognizes the right of television to compete for the patronage of the entertainment minded public; but it is not willing to permit its theatre patrons to be taken away by the non-permissive and non-compensated use of its copyrighted material, to acquire and create which it expended hundreds of thousands of dollars. The competition of television, to be fair, ought to be carried on with its own material, not with that created and owned by its competitors.

ARGUMENT.

I.

Parody Is No More Important Than Any Other of the Literary Arts. It Does Not Have Such a Preferred Legal Position as Would Entitle Parodists to Pirate Copyrighted Material in Circumstances Which Would Render Any Other Copier Liable for Copyright Infringement.

Parody, no doubt, is an ancient and socially valuable art. So are the other literary arts, such as the novel, the drama or serious scholarly writing, which have done their share in enlightening and entertaining the world. The practitioners of these arts advance learning and knowledge no less than parodists. They are entitled to at least as much encouragement and support at the hands of the law as the latter. Yet, if any one of them—the novelist or dramatist, for instance—were to copy substantial parts of the copyrighted photoplay here involved he would be an infringer. [*Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F. 2d 354, 360-361; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 81 F. 2d 49, 55-56, *cert. den., Metro-Goldwyn Pictures Corp. v. Sheldon*, 298 U. S. 669.]

What considerations of policy or social utility require that the parodist, but only he, be given a position of immunity from the operation of the Copyright Act not accorded anyone else? It cannot be that parody is so much more important in the scheme of things than any other form of literary, dramatic or scholarly expression. One need not deny parody a place of equality with these others in order to affirm that it has no preferred place. Nor can the answer be, as petitioners assert it is, that parody cannot live without that preference; for it can, as petitioners' own expert witness established and as an examination of

the art will show. That is so because there is much in any copyrighted work which is necessarily in the public domain and which, even during the copyright term, is free to the parodist as it is to all others. It is enough to enable him to make that identification with the work being parodied which, it is asserted, is essential to good burlesque. [See, Point II, *infra*.]

The answer clearly is not that the law confers the preference claimed. Neither the Copyright Act in terms nor the gloss which it has received at the hands of the courts requires or even permits such an extraordinary preference to be given the parodist. The true answer is the one given by the courts below—the parodist has the same standing as any other author in respect of what he may or may not take from the works of others.

First: Copyright secures to its proprietor the exclusive right, for limited times, to "copy and vend the copyrighted work . . . and to play or perform it in public for profit, and to exhibit, represent, produce or reproduce it in any manner or by any method whatsoever. . . ." [17 U. S. Code, sec. 1(a)(c).] The Act, therefore, necessarily proscribes copying or reproduction by another in any of "the various modes in which the matter of any publication may be adopted, imitated or transferred . . . ." [*Nutt v. National Institute*, 2 Cir., 31 F. 2d 236, 238.] So, by way of illustration, the copyright of a motion picture secures the right to remake it in any manner or by any method by which it may be exhibited, performed, represented or reproduced. [*Universal Pictures Co. v. Harold Lloyd Corp., supra*, 162 F. 2d at 374.] So, too, a copyrighted piece of statuary may not be reproduced as a lamp base, even though utilitarian objects as such are not

copyrightable. [*Stein v. Mazer*, 4 Cir., 204 F. 2d 472, 477-480, *affirmed*, *Mazer v. Stein*, 347 U. S. 201; *Stein v. Rosenthal*, S.D.Cal., 103 F. S. 227, 231, *affirmed*, 9 Cir., 205 F. 2d 633.] A dramatization of a cartoon strip infringes, notwithstanding the imitation was mere parody or burlesque. [*Hill v. Whalen & Martell*, S.D.N.Y., 220 Fed. 359, 360. See, also, *National Comics v. Fawcett Publications*, 2 Cir., 191 F. 2d 594, 603.] In short, rights secured by copyright are infringed by copying in any medium; for the purpose of the Act is to give the proprietor the exclusive right "to any lawful use of his property, whereby he may get a profit out of it . . ." [*King Features Syndicate v. Fleischer*, 2 Cir., 299 Fed. 533, 535-536; *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, 278, *cert. den., Ralph A. Freundlich, Inc. v. Fleischer Studios*, 294 U. S. 717.]

In the instant case, the right to remake "Gas Light" as a comedy, parody or burlesque, is just as exclusively Loew's as is the right to transform it into a novel or a musical comedy or any other form into which unauthorized transformation by another would admittedly be an infringement. The Copyright Act does not exclude any of these media from the embrace of the exclusive right which it confers. Acceptance of petitioner's contention, however, would require that an exclusion of parody be carved out of the Act by main force.[2]

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[2]Parody, having the ancient lineage which it has, was undoubtedly known to the Congress at the times the various copyright acts were adopted. Had an exception in favor of parody been desired it would have been a simple matter for the Congressional intention to have been expressed in the statute.

Second: While authority or comment upon parody as a defense *per se* is not abundant, what there is of it is consistent with the judgments below. For example, the unauthorized performance of substantial parts of a copyrighted song is an infringement, even though done as part of a parodied imitation of the singer who popularized the song. [*Green v. Luby*, C.C.N.Y., 177 Fed. 287. *Cf.*, *Green v. Minzenheimer*, C.C.N.Y., 177 Fed. 286, finding no infringement where the parody was confined to the performer's mannerisms and did not include any copyrighted material. *Cf.*, also, *Bloom & Hamlin v. Nixon*, C.C.Pa., 125 Fed. 977, 978.] Again, a dramatization of a copyrighted cartoon strip has been held an infringement notwithstanding the plea that it "was a mere parody or burlesque of the original and was so intended." [*Hill v. Whalen & Martell, supra*, 220 Fed. 359.] There is not even an intimation in the American decisions, so far as we have been able to discover, to the contrary of the proposition that parody, like any other copy or imitation, will infringe if it takes substantial copyrightable material from the original.[3]

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[3] A dictum in an English case [*Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261, 268], to the effect that a burlesque would not be an infringement if by independent labor and revision an original result were created, has been criticized as not representing the law of England. [See, 7 Halsbury's Laws of England (2d ed., Lord Hailsham) 567, saying: ". . . there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque. A burlesque may, of course, be no infringement because it does not reproduce any of the incidents of the play burlesqued, but only the plot in which there is no copyright . . ."]

Professional commentaries are not otherwise, despite petitioners' assertion [Pet. 16] that they are.[4] They rec-

[4]We are not unaware of the strictures made by Judge Yankwich, extra-judicially, upon the opinion of the District Judge at bar. [33 Canadian Bar Rev. 1130.] Those comments, by the Chief Judge of the trial court in which this case was decided, were made while the cause was still pending in the Court of Appeals; in fact, they were made at a time which enabled petitioners to make emphatic use of them in their briefs in the latter court. The Court of Appeals was not persuaded by them; and should not have been. Judge Yankwich's own rationalization of the doctrine of fair use supports the result reached at bar. According to him, the criteria which determine whether a use is fair are: (1) "the quantity and importance of the portions taken"; (2) "their relation to the work of which they are a part"; and (3) "the result of their use upon the demand for the copyrighted material." So, the use is not fair if the quantity taken is substantial; or if it is an important part of the work; or, if its use will reduce the demand for the original. [*Toksvig v. Bruce Pub. Co.*, 7 Cir., 181 F. 2d 664, 666-667; *Lawrence v. Dana*, C.C.Mass., 15 Fed. Cas. 26, 60-61 (Case No. 8136); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 6 Cir., 135 F. 2d 73, 84-85; *New York Tribune v. Otis & Co.*, S.D.N.Y., 39 F. S. 67, 68; *Broadway Music Corp. v. F-R Pub. Co.*, S.D.N.Y., 31 F. S. 817, 818.] Here, the parts taken were substantial; and they were important to each of the works since they made up a substantial part of each, without which there would have been neither photoplay nor television play [R. 84, Find. XII]. Reduction of demand for the original will in itself keep a use from being held fair; but it is not a necessary element of infringement. A copyright owner "may refrain from vending or licensing, and content himself with simply exercising the right to exclude others from using his property." [*Fox Film Corp. v. Doyal*, 286 U. S. 123, 127; *Leon v. Pacific Tel. & Tel. Co.*, 9 Cir., 91 F. 2d 484, 486-487; *Falk v. Donaldson*, S.D.N.Y., 57 Fed. 32, 36-37; *Macmillan Co. v. King*, D.C.Mass., 223 Fed. 862, 867-868; *Reed v. Holliday*, W.D.Pa., 19 Fed. 325, 327.] Furthermore, the potentiality for such reduction was present in the instant situation; for petitioners' play was intended for exhibition on television, which is a natural and lucrative medium for exhibition of photoplays such as "Gas Light". [For a discussion of the harm which parody can do to the original, see Kitchin, *Survey of Burlesque and Parody in English*, xvii, xix-xx.]

Judge Yankwich apart, the other commentators referred to by petitioners [Pet. 7, note **] seem to approve the result reached below.

ognize (with one possible exception) that parody or burlesque which takes substantial copyrighted material from the original infringes.[5]

Third: In the sense in which petitioners use the term "fair use"[6] the reference is to a doctrine which permits the use of some copyrightable material without express license when the use is within the scope of the purpose for which

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[5]Spring, *Risks and Rights*, pp. 177-178, 183, 186, adopts the same criteria advocated by Judge Yankwich [note 4, *supra*] and particularly emphasizes the quality and value, as well as the quantity of the material taken, as the test of fairness of use. Lindey, *Plagiarism and Originality*, p. 43, says that parody cannot lawfully be "a transparent cover-up for stealing." Weil, Ball and Amdur, all refer to the decisions which we have cited [Point I, *Second, supra*] and state their holdings in a way which indicates concurrence in the idea that what they call mimicry—and which from the cases cited is seen to be parody or burlesque—is not a defense to a charge of substantial appropriation. [Weil, *Law of Copyright*, p. 418, sec. 1097; Ball, *Law of Copyright and Literary Property*, pp. 291-292, 422; Amdur, *Copyright Law & Practice*, pp. 748-749, 759-762, 777.] The English commentators are even more incisive. For example, in Copinger and Skone James, *Law of Copyright* (8th ed. 1948), pp. 129, 131-132, the test in every case, it is said, is whether substantial copyrighted material has been used, so that "a work which slavishly used the plot and incidents of another would not be defensible under the cloak of burlesque." Similarly, in Clarke, *Copyright and Industrial Design* (1951), p. 63, it is said that burlesque "may be an infringement, the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced."

DeWolf, *Outline of Copyright Law*, pp. 97, 142, citing no cases, does say that it "is well settled that parody is not an infringement of the right to copy. . . ." This comment, however, is prefaced by a statement of his view that the basis of fair use is implied consent; and that parody is a form of fair use. [See, also, note 7, *infra*.] No such consent can be fairly implied in the case at bar. There was, in fact, express dissent by the copyright proprietor. [R. 65-68; 84-85 (Find. XIV).]

[6]The term has been used in two somewhat different senses in the American cases. One of these, for which Judge L. Hand is responsible, refers to a taking of the uncopyrightable elements of a copyrighted work, *e.g.*, its general plot, theme or abstract ideas or

the copyrighted work was intended.[7] It does not permit of a substantial taking and it has never been extended to the point where it makes lawful "wholesale copying and publication of copyrighted material. . . ." [*Leon v. Pacific Tel. & Tel. Co., supra*, 91 F. 2d at 486.] To the contrary, a use is not fair if as a result of it the second author has done little more than "to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit. . . ." [*Conde Nast Publications v. Vogue School*, S.D.N.Y., 105 F. S. 325, 333; *Toksvig v. Bruce Pub. Co., supra*, 181 F. 2d at 667; *Lawrence v. Dana, supra*, 15 Fed.Cas. at 62 (Case No. 8136); *Simms v. Stanton*, C.C.Cal., 75 Fed. 6. 10.] And certainly a use is not fair if thereby the rights of the original author are injuriously affected or the objects of his work superseded. [*Sampson & Murdock Co. v. Seaver-Radford Co., supra*, 140 Fed. at 541; *Mathews Conveyor Co. v. Palmer-Bee Co., supra*, 135 F. 2d at 85; *Baker v. Selden*, 101 U. S. 99, 102-103.] Nor is it fair if the quality and quantity of the material taken are substantial. [Cases cited, note 4, *supra*.]

If one writes a learned treatise or prepares a compilation, intended for the instruction of others or as a work

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conceptions. [*Sheldon v. Metro-Goldwyn Pictures Corp., supra*, 85 F. 2d at 54; *Towle v. Ross*, D.C.Ore., 32 F. S. 125, 127; *Warner Bros. v. Columbia Broadcasting System*, S.D.Cal., 102 F. S. 141, 148-149.] No question of fair use in that meaning arises at bar. The finding below was that substantial "*copyrightable* and copyrighted material" was taken. [R. 84 (Find. XII). Italics ours.]

[7]The doctrine, in fact, has been rationalized in terms of implied consent. [*Henry Holt & Co. v. Liggett & Myers Tob. Co.*, E.D. Pa., 23 F. S. 302, 304; *Towle v. Ross, supra*, 32 F. S. at 127; *Sampson & Murdock Co. v. Seaver-Radford Co.*, 1 Cir., 140 Fed. 539, 541.]

of reference, it is fair to assume that others in the field will make such a use of it. [See, *e.g.*, *West Pub. Co. v. Edw. Thompson Co.*, E.D.N.Y., 169 Fed. 833, 843, 857, *modified*, 2 Cir., 176 Fed. 833, 838.] Consequently, some greater leeway in determining what is a "substantial taking" may safely be allowed. [See, for example: *Webb v. Powers*, C.C.Mass., 29 Fed. Cas. 511, 516-517 (Case No. 17323); *American Inst. of Architects v. Fenichel*, S.D.N.Y., 41 F. S. 146; *Macmillan Co. v. King*, *supra*, 223 Fed. at 866.] So, too, one must expect that a published work will be reviewed and criticized and that, in connection with the review, parts may be quoted or paraphrased. [*Folsom v. Marsh*, C.C.Mass., 9 Fed. Cas. 342, 344-345 (Case No. 4901); *New York Tribune v. Otis & Co.*, *supra*, 39 F. S. at 68; *Hill v. Whalen & Martell*, *supra*, 220 Fed. at 360.] Uses such as these are fairly within the scope of the purpose for which the work was designed. They do not fill the same general need for which the original was produced. Such uses are quite another matter, however, from using the original material in another work of the same kind or genre and which may forestall public acceptance of the original.

In the case at bar it was the latter sort of use which was made of respondents' work by the petitioners. They produced a play or drama—comic to be sure, instead of serious as was the original—but nevertheless copied from respondents' play. They proposed to exhibit or represent it on television—a medium also adapted to exhibition of respondents' work, and over which that work could not be lawfully exhibited without respondents' license. Thus, had petitioners been successful in their design, they would have diluted, if not pre-empted, at least the television market for the original. To permit such a use would be

simply, under cover of a label, to do away with the rights intended to be secured by copyright.[8] That is not fair use in any sense of the term.

II.

The Argument That Parody Cannot Exist Without the Right to Appropriate Substantial Copyrighted Material Disregards the True Nature of Parody and Ignores the Law Which Denies Copyrightability to Plots, Themes and Ideas.

Petitioners' argument for importance, as well as their argument for a reversal,[9] rests solely on the supposed inability of parody to survive unless parodists have the right to take their material at large from copyrighted works. The argument is erroneous in its factual premise; and it involves a disregard of established copyright law.

The foundation of the argument is that parody needs to identify the original which is being taken off.[10] That

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[8]Suppose petitioners had performed respondents' play exactly as written and at length, achieving the effect of parody or burlesque simply by exaggerating or burlesquing the mannerisms, reading of lines, and acting techniques of the performers. Surely, infringement of the copyright in a dramatic composition is not dependent on the manner of rendition. Yet, petitioners' argument leads to that absurd test; for their defense, in essence, is that they merely performed comically that which was serious in the original.

[9]Realistically, the petition for certiorari presents nothing but a request for another review by the party defeated in the Court of Appeals. None of the required grounds upon which to base a certiorari is vouchsafed. Rather, the argument is devoted to the merits of the cause and the supposed error of the two courts below in its disposition. [See *Magnum Import Co. v. Coty*, 262 U. S. 159, 163.]

[10]We need not disagree with this proposition or with the distinguished President quoted by petitioners. [Pet. 8.] It may be noted, however, that Mr. Lincoln's complaint was not that the parody did not make the original recognizable to those who knew of it; but that *he* was unfamiliar with it.

identification can be made without plagiarizing. With respect to every copyrighted work, as Judge L. Hand among others has observed, some part of "its content [goes] to some extent into the public domain. . . ." [*Nichols v. Universal Pictures Co.*, 2 Cir., 45 F. 2d 119, 122, *cert. den.*, 282 U. S. 902.] That part is its plot or theme, its abstract ideas or conceptions, its general framework, as distinguished from the author's treatment and development of that theme, conception or framework. [*Dellar v. Goldwyn*, 2 Cir., 150 F. 2d 612, 613, *cert. den.*, 327 U. S. 790; *Sheldon v. Metro-Goldwyn Pictures Corp.*, *supra*, 81 F. 2d at 54; *Shipman v. R.K.O. Radio Pictures*, 2 Cir., 100 F. 2d 533, 538; *Harold Lloyd Corp. v. Witwer*, 9 Cir., 65 F. 2d 1, 19-20, 23-27; *Twentieth Century-Fox Corp. v. Dieckhaus*, 8 Cir., 153 F. 2d 893, 898-899.] In material of that sort, which copyright does not protect and which, therefore, is available to all, there is ample substance from which to fashion a recognizable identification with the work being parodied.

Furthermore, true parody "does not parallel [the original] in the sense that it just recreates the thing in a new tone, but takes off from it. . . . But [it] in no sense parallels the original." [R. 156.] That was the exact testimony of petitioners' expert—Dr. Baxter. Its significance is clear. Parody does not require slavish copying in a different mode; it does not require the pirating of substantial parts of the original. All that it needs, when it is genuinely parody and not merely a short-cut to supplying oneself with literary or dramatic material for one's own commercial purposes, is the plot, the conception, the ideas, or the central theme of the original. And all of

these are still open to the parodist just as they were before the decision of this cause.[11]

Finally, true parody is not always, nor need it be, a detailed copy of a specific work. It is much more often a lampoon of another's ideas or style, or of a school of thought or philosophy. [See, *e.g.*, R. 116, 118, 120-121, 129, 169-170. See, also, Kitchin, *Survey of Burlesque and Parody in English*, 1-10, 38-39, 49 *et seq.*, 152-153, 250-251.] To achieve such a lampoon one need never take from the original any more than that which anyone, before the decision at bar was, and is now still, free to take. "Style is of the essence of true parody." [Kitchin, *op. cit.*, 167.] The fear expressed by petitioners that the decision at bar will unduly restrict the genuine parodist is merely hyperbole.[12]

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[11]The point is aptly illustrated by the decision of the District Judge, before whom the instant cause was tried, in *Columbia Pictures Corp. v. National Broadcasting Co.*, S.D.Cal., 137 F. S. 348, 350-351, 352-353. There, a completely recognizable parody of the novel and photoplay "From Here To Eternity" was held no, to be an infringement because substantial *copyrightable* material was not taken.

[12]The real purpose behind the defense of the right of the parodist to take as he will from another's work, which has been made at bar, is laid bare when we recall the identities and the interests of the defenders. They are here: Jack Benny, a television and radio comedian who must each week or so have enough dramatic or comic material to fill out a program which he produces for profit and which competes with respondent Loew's photoplays for the patronage of the public; Columbia Broadcasting System, whose sole function is to sell time for commercial advertising purposes and for whom the entertainment program is simply a means of capturing an audience; and, that hitherto unsuspected patron of the arts, American Tobacco Co., manufacturers of Lucky Strike cigarettes. The claim of this oddly assorted cast that they were indulging in "criticism" of respondents' photoplay is, as the Court of Appeals said, itself "a parody upon the meaning of criticism." [R. 284-285.]

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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